UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 94-4006

May 9, 1995

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In re SOUTHEAST BANKING CORP., SECURITIES LITIGATION

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HARVEY WEINER, et al., a national banking association,

*Plaintiffs-Appellees*,

—v.—

SOUTHEAST BANKING CORP., CHARLES J. ZWICK, JOHN PORTA, G. DODSON MATHIAS, PAUL HILL, KIRSTEN M. HUDAK,

*Defendants*,

WILLIAM A. BRANDT, JR., as Administrator of the Investment Plus Plan of Southeast Banking Corp.,

*Appellant*.

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Appeal from the United States District Court for the Southern District of Florida.

Before COX and BLACK, *Circuit Judges*, and FAY, *Senior Circuit Judge*.

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PER CURIAM:

This appeal arises from a class action settled against Southeast Banking Corporation. The district court approved the settlement and was faced with the issue of attorneys's fees and costs. William A. Brandt, Jr., as administrator of a pension plan for former Southeast Bank employees, objected to the request for attorneys's fees by class counsel. The district judge overruled the objection and approved attorneys's fees of twenty-five percent of the settlement. Brandt attempts to appeal that ruling.

Brandt was not a named party. He never moved to intervene in the class action as administrator of the pension plan. Here, he attempts to base standing to appeal on his having objected to the request for attorneys's fees.

We find that our Circuit's precedent is clearly established in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Brandt, a nonnamed class member who failed to intervene, lacks standing to appeal the district court's order on attorneys's fees. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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Filed Nov. 24, 1993

MASTER FILE

CIVIL ACTION

No. 90-0760-CIV-MOORE

JURY TRIAL DEMANDED

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IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

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THIS DOCUMENT RELATES TO ALL ACTIONS

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## ORDER AND FINAL JUDGMENT

This proceeding (the "Litigation") consists of consolidated Class Actions brought by Class Representative Plaintiffs Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust ("Plaintiffs") individually and as representatives of all Class Members (as hereinafter defined), against Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (collectively referred to as the "Defendants").

On March 22, 1990, a class action complaint was filed in this court entitled *Harvey Wiener v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760, on behalf of the named Plaintiff and all others similarly situated. Another class action was subsequently filed in this Court by Plaintiff Hall, entitled *William J. Hall v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838.

On April 23, 1990, the actions were filed as one consolidated, amended complaint. Thereafter, on April 27, 1990, a Second Consolidated Amended Complaint was filed, and on or about July 18, 1990, upon the stipulation of the parties, Plaintiffs were granted leave to file a Third Consolidated Amended Complaint. In that Complaint, Plaintiffs, The Maynard Slessinger Trust and Paula B. Folkman, joined in the action, alleging purchases of Southeast Banking Corp. securities during the second quarter of 1990. After the filing of the Third Consolidated Amended Complaint, this cause proceeded through motion practice. On September 20, 1992, Southeast Banking Corp. filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code. On November 7, 1991, Plaintiffs Wiener, Hall, The Maynard Slessinger Trust and Paula P. Folkman, previously Plaintiffs in this action, as well as Plaintiffs Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, who sought to join as Plaintiffs in this action, moved to file a Fourth Consolidated Amended and Supplemental Complaint. The proposed Fourth Consolidated Amended and Supplemental Complaint deleted Southeast Banking Corp. from the named Defendants and sought recovery, in addition to that sought in the Third Consolidated Amended Complaint, for those persons who purchased common stock and debentures of Southeast Banking Corp. subsequent to June 15, 1990 through July 3, 1991. On March 12, 1992, United States District Judge William J. Zloch granted Plaintiffs' motion to File a Fourth Consolidated Amended and Supplemental Complaint.

The Fourth Consolidated Amended and Supplemental Complaint, as amended by this Court's order of August 27, 1993,

alleges, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp. during the period from February 27, 1989 through and including September 20, 1991. The defendants have denied the material allegations of the Fourth Consolidated Amended and Supplemental Complaint and any wrongdoing and any liability to Plaintiffs or to the Class they represent.

Pursuant to the Stipulation and Agreement of Settlement (the "Stipulation") dated August 19, 1993, all persons who purchased or otherwise acquired Southeast Banking Corp.'s publicly traded Securities including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures, and/or securitized asset interests during the period from February 17, 1989 through and including September 20, 1991 (the "Class Period") are Class Members in connection with the above litigation. Excluded from the Class are Defendants, former officers and directors of Southeast Banking Corp., or any of their spouses, heirs, executors, administrators, successors and assigns. Plaintiffs' Lead Counsel, acting on behalf of the Class, has entered into the Stipulation and has applied to this Court for approval of the stipulation and the terms thereof pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

On August 27, 1993, an Order with Respect to Notice, Settlement Hearing and Administration was entered by this Court directing that notice be given to the Class of the proposed Settlement, and of a hearing to determine whether the proposed Stipulation and Settlement should be approved as fair, adequate and reasonable, to fix the fees and reimbursement of expenses of Plaintiffs' Counsel, and to consider individual awards to the named Plaintiffs, as well as to hear any objections thereto. Such a hearing was held, as noticed, on November 15, 1993. Prior to the Settlement Hearing, proof of notice, as directed in said Order, was presented and filed. Members of the Class were given the opportunity to submit Requests for Exclusion from the Class on or before October

18, 1993 (which deadline was extended by further stipulation and Order of this Court to 5:00 p.m., November 9, 1993) and a statement listing the persons who have timely filed such Requests for Exclusion has been filed with the Court. Members of the Class were also notified of their right to appear at the hearing in support of or in opposition to the proposed Settlement and award of fees and reimbursement of expenses.

The Court having heard Plaintiffs' Lead Counsel, on behalf of Plaintiffs and the Class, and Defendants' Representative Counsel, Lewis F. Murphy, P.A. of Steel Hector & Davis, and Robert T. Wright, Jr. of Mershon, Sawyer, Johnston, Dunwody & Cole, on behalf of Defendants, and having reviewed all of the submissions presented with respect to the proposed Settlement, and the Court having determined that the Settlement is fair, adequate and reasonable and that it is in the best interests of the Class to consummate the Settlement in accordance with the provisions of the Stipulation, and having considered the Petition of Plaintiffs' Counsel for awards of fees and reimbursement of expenses and awards to the named Plaintiffs and having reviewed the affidavits, schedules and exhibits submitted in support thereof, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has subject matter jurisdiction over this action.

2. The Court incorporates herein by reference the definitions set forth in the Stipulation of Settlement.

3. Notice to the Class required by Rules 23(c) and (e) of the Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, constituting the best notice practicable, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Class;

4. The members of the Class ("Class Members") are as described above, including their spouses, heirs, executors, administrators and assigns, if any, but excluding all persons

who timely filed a request to be excluded from the Class pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure as listed on Exhibit A hereto, and whose exclusion is hereby approved.

5. The proposed Settlement (as provided for in the Stipulation, dated August 19, 1993) is in all respects fair, adequate, reasonable and proper and in the best interests of the Class, and is approved. The Court also finds that payment by National Union of the Settlement Funds under the Policy is in good faith, although it will deplete the Policy. Such payment is hereby authorized and approved by the Court.

6. Plaintiffs, Class Members and the Defendants shall consummate the Settlement according to the terms of the Stipulation.

7. The persons who have timely requested exclusion from the Class shall not participate in the proceeds of the Settlement hereby approved or receive any benefit thereunder, and are not bound by this Order.

8. Plaintiffs and each and every Class Member are permanently barred and enjoined from asserting either directly or indirectly, individually or in a representative capacity, any Released Claim and/or any claim, right, demand or cause of action which could have been asserted based upon a Released Claim, against Defendants or any Released Party.

9. This Litigation is dismissed with prejudice and on the merits and without award of court costs, and all Released Claims, as defined in the Stipulation, are hereby extinguished.

10. Jurisdiction is hereby retained as to matters relating to the administration, consummation, enforcement and interpretation of the Settlement only. This limited retention of jurisdiction to administer the Settlement shall in no way affect the finality of this judgment with respect to any matter in this Order. This Order is final and appealable in all respects.

11. Neither this Final Judgment nor the Stipulation of Settlement are an admission or concession by any of the Defendants of any actual or potential fault, omission, liability or wrongdoing. This Judgment is not a finding as to the validity or invalidity of any claims in the Litigation or of any wrongdoing by any of the Defendants. Neither this Judgment nor the Stipulation nor the fact of settlement, nor the settlement proceedings, nor the settlement negotiations, nor any related document shall be used as an admission of any actual or potential fault or omission by any person, nor offered or received in evidence as an admission, concession, presumption or inference against any party in any proceeding, except that the Stipulation may be offered as evidence in any proceeding to enforce the Stipulation.

12. Plaintiffs' Lead Counsel, on behalf of all Plaintiffs' Counsel, are awarded the sum of $1,250,000.00 as legal fees and $98,859.57 as reimbursement of their costs and out-of-pocket expenses to date. Such fees shall be allocated by Plaintiffs' Lead Counsel among those plaintiffs' counsel who have contributed to the Settlement in such proportion as Plaintiffs' Lead Counsel determines is fair and equitable.

13. Each of the named Plaintiffs is awarded the sum of $2,000.00 over and above their respective shares of the Settlement Fund.

14. This Order and Final Judgment, and the Stipulation upon which it is based, shall apply to any claims which have been or could be brought by Class Members, individually (including the equitable right to demand and to seek to pursue any derivative claim on behalf of Southeast Bank, N.A. and Southeast Bank of West Florida). However, this Order and Final Judgment, and the Stipulation upon which it is based, shall not apply to any claims which have been or could be brought by the Federal Deposit Insurance Corporation, for any alleged injury to Southeast Bank, N.A. and Southeast Bank of West Florida.

15. This Order and Final Judgment, and the Stipulation upon which it is based, shall apply to any claims which have been or could be brought by Class Members, individually (including the equitable right to demand and to seek to pursue any derivative claim on behalf of Southeast Banking Corporation). However, this Order and Final Judgment, and the Stipulation upon which it is based, shall not apply to any claims which have been or could be brought by William A. Brandt, Jr., as Trustee of Southeast Banking Corporation, for any alleged injury to Southeast Banking Corporation.

ENTERED this 23rd day of November, 1993.

/s/ KEVIN MICHAEL MOORE
Honorable Kevin Michael Moore
United States District Judge

cc: To All Counsel of Record

LFM:sd/1491

EXHIBIT "A"

SHAREHOLDERS' REQUESTS FOR EXCLUSION
IN RE: SOUTHEAST BANKING CORPORATION
SECURITIES LITIGATION
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
MIAMI DIVISION
CASE NO. 90-0760-CIV-MOORE

| *Name, Address* | *Letter Dated* |
|---|---|
| Kenneth F. Palmer<br>Susan F. Palmer Jt Ten.<br>104 Lynwood Avenue<br>Titusville, FL 32796-3214 | 09/27/93 |
| Lester Fredel<br>655 Island Road<br>Bay Point<br>Miami, FL 33137-3324 | 10/01/93 |
| Mary Ethel Tucker<br>(deceased) and<br>Jane G. Clenney,<br>Joint Tenants<br>4055 Myra Street<br>Jacksonville, FL 32205 | 10/08/93 |
| American Pioneer, Inc.<br>by Bernard M. Brodsky<br>Counsel, RTC/PLS<br>Resolution Trust<br>Corporation<br>1717 H Street, N. W.<br>Washington, D. C. 20006 | 10/12/93 |

| *Name, Address* | *Letter Dated* |
|---|---|
| I. Fred Fredel<br>4000 Towerside Terrace<br>Tower IV, Apt. 1601<br>Miami, FL 33138-2235 | 10/08/93 |
| Orlando A. Baro<br>306 Apache Trail<br>Brandon, FL 33511 | 10/11/93 |
| Hector M. Esteve<br>201 Crandon Blvd., Apt. 328<br>Key Biscyane, FL 33149 | 10/15/93 |
| Franicis W. and Mary<br>Ellen Raynes, Jt. Ten.<br>Post Office Box 380<br>Oakfield, Maine 04763 | 10/12/93 |
| Gilliam D. Bentley, Sr.<br>Post Office Box 7446<br>Marietta, GA 30065-1446 | 10/16/93 |
| Surfboard & Co.<br>nominee name for<br>California Public Employees'<br>Retirement System<br>1 Enterprise Drive<br>North Quincy, MA 02071 | 10/15/93 |

1461/10/21/93

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 94-4006

Filed July 19, 1995

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IN RE: SOUTHEAST BANKING CORP.,
SECURITIES LITIGATION.

HARVEY WEINER, et al., a national banking association,

*Plaintiffs-Appellees*,

versus

SOUTHEAST BANKING CORP., CHARLES J. ZWICK, JOHN PORTA, G. DODSON MATHIAS, PAUL HILL, KIRSTEN M. HUDAK,

*Defendants*,

WILLIAM A. BRANDT, JR., as Administrator of the Investment Plus Plan of Southeast Banking Corp.,

*Appellant*.

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On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX and BLACK, *Circuit Judges*, and FAY, *Senior Circuit Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ EDWARD R. COX
United States Circuit Judge

ORD-42
(9/91)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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MASTER FILE
Filed August 20, 1993

CIVIL ACTION NO. 90-0760-CIV-MOORE

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IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

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THIS DOCUMENT RELATES TO ALL ACTIONS

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## STIPULATION OF SETTLEMENT

WHEREAS, on March 22, 1990, a class action complaint, captioned *Harvey Wiener, etc. v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760, was filed in this Court against Southeast Banking Corporation ("Southeast Banking Corp.") and certain named and unnamed officers, directors, attorneys, accountants and advisors alleging, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp.; and

WHEREAS, on March 27, 1990, a second class action, captioned *William J. Hall, etc. v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838, was filed in this Court against Southeast Banking Corp. and certain named and unnamed

officers, directors, attorneys, accountants and advisors alleging, *inter alia*, violations of federal and state law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp.; and

WHEREAS, on April 23, 1990, plaintiffs Wiener and Hall entered into a stipulated pretrial order consolidating their complaints under the caption "*In re: Southeast Banking Corp. Securities Litigation*," Case No. 90-0760-CIV (the "Litigation"); and

WHEREAS, as part of that stipulation, the law firm of Greenfield & Chimicles (succeeded by and hereinafter referred to as Chimicles, Burt, Jacobsen & McNew), the law firm of Stull, Stull & Brody and the Law Offices of Joseph H. Weiss were designated as Plaintiffs' Lead Counsel; and

WHEREAS, on April 23, 1990, a consolidated amended complaint was filed in the Litigation; and

WHEREAS, on April 27, 1990, a second consolidated amended complaint was filed in the Litigation in order to correct an inaccuracy in the description of plaintiff Hall's securities; and

WHEREAS, defendants moved to dismiss the second consolidated amended complaint; and

WHEREAS, before any ruling was made on defendants' motion to dismiss the second consolidated amended complaint, plaintiffs on July 11, 1990 served a third consolidated amended complaint, which extended the class period and added plaintiffs The Maynard Slessinger Trust and Paula P. Folkman; and

WHEREAS, defendants also moved to dismiss the third consolidated amended complaint; and

WHEREAS, after a hearing, Magistrate Judge Linnea Johnson issued a Report and Recommendation on June 26, 1991

recommending dismissal *of the third consolidated amended* complaint; and

WHEREAS, on July 11, 1991, plaintiffs' counsel filed objections to and moved to vacate the Magistrate's Report, which objections and motion were never ruled on; and

WHEREAS, On September 19, 1991, the Comptroller of the Currency declared insolvent Southeast Banking Corp.'s principal subsidiary banks, Southeast Bank, N.A. ("Southeast Bank") and Southeast Bank of West Florida, and appointed the Federal Deposit Insurance Corporation (the "FDIC") as Receiver of these banks; and

WHEREAS, on September 20, 1991, Southeast Banking Corp. filed for liquidation under Chapter 7 of the U.S. Bankruptcy Code; and

WHEREAS, on March 12, 1992, the Court entered an order granting plaintiffs' motion for leave to file a fourth consolidated amended and supplemental complaint alleging, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp. through July 3, 1991, adding plaintiffs Gasper Sclafani, Myers L. Girsh and D.C.A. Grantor Trust, adding certain additional officer and/or director defendants, and dropping defendant Southeast Banking Corp. as a party defendant; and

WHEREAS, on June 16, 1992, the Trustee in Bankruptcy for Southeast Banking Corp. initiated an action against certain of the Defendants herein, and other former officers and directors of Southeast Banking Corp., alleging mismanagement and breaches of fiduciary duty, in an action styled *William A. Brandt Jr. v. Florence S. Bassett, et al.*, Case No. 92-1600-CIV-Aronovitz (the "Trustee Suit"); and

WHEREAS, on September 4, 1992, the FDIC moved to intervene in the Trustee Suit asserting that any claims that exist for mismanagement and breaches of fiduciary duty would be solely and exclusively the rights of the FDIC; and

WHEREAS, the FDIC's motion to intervene was granted; and

WHEREAS, subsequent to the FDIC's intervention in the Trustee Suit, both the FDIC and the Trustee moved for summary judgment on the issue of ownership of the claims; and

WHEREAS, both the Trustee and FDIC have asserted claims in excess of the amount of the available directors and officers liability insurance and each claim is viewed by Plaintiffs' Lead Counsel as a competing claim to the claims asserted on behalf of the Class in the Fourth Amended Complaint; and

WHEREAS, on April 29, 1993, United States Magistrate Linnea R. Johnson recommended that the Trustee Suit be dismissed, and that the FDIC's motion for summary judgment as to the ownership of the claims be granted; and

WHEREAS, Plaintiffs' Lead Counsel thereafter attempted to explore a coordinated prosecution of the class claims and the FDIC claims, with an appropriate allocation of the recovery to the Class; and

WHEREAS, those efforts failed, and it became apparent to Plaintiffs' Lead Counsel that the FDIC intends to prosecute its claim as a competing claim to the Class action; and

WHEREAS, on July 21, 1993 United States District Judge Sidney M. Aronovitz entered an order adopting that portion of Magistrate Johnson's report which affirms the FDIC's right to pursue any definitive claims which may be brought against, among others, the Defendants herein; and

WHEREAS, Judge Aronovitz' order allows the Trustee to pursue certain direct claims against, among others, the Defendants herein; and

WHEREAS, on May 4, 1993, the Resolution Trust Corporation ("RTC"), acting as the receiver for American Pioneer Savings Bank also filed a suit against, inter alia, the Defendants in this action, alleging violations of federal securities laws in relation to Southeast; and

WHEREAS, the RTC's suit is also a competing claim to the Class action; and

WHEREAS, on August 14, 1992, plaintiffs moved for the entry of an order certifying them as representatives of a class of all persons who purchased Southeast Banking Corp.'s publicly traded common stock, convertible subordinated debentures, and non-convertible debentures during the period of February 27, 1989 through and including July 3, 1991, excluding the Defendants, members of their immediate families, their successors and assigns; and

WHEREAS, Defendants have again moved to dismiss the Litigation, and this motion is under advisement by this Court; and

WHEREAS, in the months following the filing of the aforementioned complaints, counsel for the plaintiffs, by and through Plaintiffs' Lead Counsel and experts consulted by them, have conducted a thorough examination into and evaluation of the law and facts relating to the matters set forth in the fourth consolidated amended and supplemental complaint, in order to determine how best to confer a substantial benefit upon the Class (defined below), in light of the obstacles to and risks of establishing liability and damages; and

WHEREAS, based upon their discovery, investigation and evaluation of the facts and law relating to the matters set forth in the fourth consolidated amended and supplemental complaint, Plaintiffs' Lead Counsel after conferring with other plaintiffs' counsel has concluded that, irrespective of any merit to the claims asserted in the fourth consolidated amended and supplemental complaint, there are substantial obstacles to collecting any judgment that may be obtained; and

WHEREAS, Plaintiffs' Lead Counsel has concluded that this Stipulation confers a substantial benefit upon the Class, and that it is in the best interests of the Class to settle the Litigation in accordance with the terms of this Stipulation; and

WHEREAS, plaintiffs, after considerable arm's length negotiations, have agreed to settle the Litigation, pursuant to the provisions of this Stipulation, after considering: (*i*) the substantial benefits that plaintiffs and the other members of the Class will receive from this Stipulation; (*ii*) the attendant risks of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; (*iii*) the uncertainty relating to the proof of the allegations included in the fourth consolidated amended and supplemental complaint; (*iv*) the uncertainty inherent in the various theories of damage which could be employed assuming liability can be established; (*v*) the limitations on obtaining and collecting any judgment in light of the bankruptcy of Southeast Banking Corp.; (*vi*) the claims of the Trustee, the RTC, and the FDIC against Southeast Banking Corp. and Southeast Bank and their respective directors and officers (including the competing claims for proceeds from the liability insurance policies obtained by Southeast Banking Corp.); (*vii*) the desirability of permitting this Stipulation to be promptly consummated according to its terms; and (*viii*) the conclusion of Plaintiffs' Lead Counsel that resolution of the Litigation is in the best interests of the Class; and

WHEREAS, Defendants deny the material allegations of the fourth consolidated amended and supplemental complaint and deny any and all liability with respect to any and all facts and claims alleged or which could have been alleged in this Litigation but consider it desirable that the Litigation be settled and dismissed because the Stipulation will: (*i*) halt the substantial expense, inconvenience and uncertainties associated with continued litigation of Plaintiffs' claims; (*ii*) finally put to rest those claims; and (*iii*) confer a substantial benefit upon Defendants including, without limitation, coverage under existing policies and the avoidance of further expense and disruption due to the pendency of the Litigation; and

WHEREAS, as a result of extensive arm's length negotiations between counsel and, in consideration of the matters

noted above, Plaintiffs and Defendants and their respective counsel have concluded that the terms of the Settlement are fair, reasonable, adequate and in the best interests of the Plaintiffs, Defendants, and the Class.

NOW, THEREFORE, IT IS HEREBY STIPULATED, CONSENTED AND AGREED, by and among plaintiffs, Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, individually and as representatives of all Class Members, as defined below ("Plaintiffs"), and defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (collectively referred to as "Defendants"), by their respective duly authorized counsel, subject to the approval of the United States District Court for the Southern District of Florida (the "Court") pursuant to Rule 23 of the Federal Rules of Civil Procedure, as follows:

A. *Definitions*

1. As used in this Stipulation and the related documents annexed hereto as Exhibits (the terms, conditions and benefits of which are incorporated herein by reference) the following terms shall have the meanings set forth below:

a. "Attorneys' Fees and Expenses" means the portion of the Settlement Funds to be paid to Plaintiffs' Lead Counsel on behalf of all plaintiffs' counsel for fees and costs, including attorneys' fees, the fees and costs of experts and consultants, and other fees and costs in any way associated with this Litigation;

b. "Authorized Claimant" means a Claimant whose claim has been allowed as provided by the terms of this Stipulation and the Final Order and Judgment;

c. "Claimant" means any Class Member who files a Proof of Claim in such manner and within such time as the Court shall prescribe;

d. The "Class" and "Class Members" mean all persons who purchased or otherwise acquired Southeast Securities during the Class Period (based upon transaction date), including their spouses, heirs, executors, administrators, successors and assigns, if any, except that "Class" and "Class Members" do not include (i) Defendants, the former officers and directors of Southeast, or any of their spouses, heirs, executors, administrators, successors and assigns; or (ii) persons who have properly excluded themselves from the Class by mailing a request for exclusion within the time required and otherwise in compliance with the Order Certifying A Settlement Class (Exhibit A-1) and Order with Respect to Notice, Settlement Hearing and Administration (Exhibit A-2), and who are recognized by the Court as having properly excluded themselves from the Class.

e. "Class Period" means the period from February 27, 1989, through and including September 20, 1991;

f. "Court" means the United States District Court for the Southern District of Florida;

g. "Date of Distribution" means the date on which the Settlement Administrator shall mail to Authorized Claimants checks representing their proportionate shares of the Net Settlement Funds. The Date of Distribution shall be as soon as practicable after the Settlement Effective Date, but at least thirty (30) days after the Settlement Effective Date;

h. "Defendants" means defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett;

i. "Defendants' Representative Counsel" means the law firms of Steel Hector & Davis and Mershon, Sawyer, Johnston, Dunwody & Cole;

j. "Excess Distribution" means any payment of Settlement Funds into the Notice and Administration Fund in excess of the initial $100,000 payment provided for in paragraph B.3.a. below;

k. "Hearing Order" means the order annexed hereto as Exhibit A-2.

l. "Individual Awards to Named Plaintiffs" means the amount as approved by the Court, if any, awarded from the Settlement Funds to each Named Plaintiff;

m. "National Union" means National Union Fire Insurance Company of Pittsburgh, Pennsylvania and/or A.I. Management and Professional Liability Claim Adjusters, which entity has the power and authority to bind National Union;

n. "Net Settlement Funds" means the Settlement Funds, plus any interest earned or accrued thereon, less (*i*) Attorneys' Fees and Expenses as authorized for recovery by the Court from the Settlement Funds; (*ii*) the Notice and Administration Fund; (*iii*) taxes that may become due, if any, with respect to the Settlement Funds; (*iv*) any other related fees and expenses, including additional Notice and Administration Expenses, as may be authorized by this Stipulation or the Court; and (*v*) any Court-authorized Individual Awards to Named Plaintiffs;

o. "Nominees" means brokerage firms, banks, and other institutions who held Southeast Securities in street names or other similar fashion for the benefit of another during the Class Period;

p. "Notice" means the Notice of Pendency of Class Action, Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear, substantially in the form of Exhibit B hereto;

q. "Notice and Administration Expenses" means and shall include the reasonable and verifiable costs associated with administration of the Settlement, including the costs associated with identifying and notifying Class Members, the printing and mailing of the Notice, the publication of any Summary Notice, reviewing and processing Proofs of Claim, assisting the making of claims, soliciting revocation of requests for exclusion, and fees and expenses payable to the Settlement Administrator or any depository institution, but excluding (i) any fees, expenses or disbursements of Plaintiffs' Lead Counsel, or other plaintiffs' counsel, or of any experts retained by Plaintiffs; and (ii) Individual Awards to Named Plaintiffs;

r. "Notice and Administration Fund" means $100,000 and such other portion of the Settlement Funds paid to Plaintiffs' Lead Counsel pursuant to paragraph B.3 below, which amount is to be held by Plaintiffs' Lead Counsel in a segregated, interest-bearing account, and utilized by Plaintiffs' Lead Counsel to pay initial Notice and Administration Expenses;

s. "Payable Claim" means the amount allocated to each Authorized Claimant pursuant to the terms of this Stipulation and the Final Judgment and Order;

t. "Plaintiffs' Lead Counsel" means the law firms of Chimicles, Burt, Jacobsen & McNew; Stull, Stull & Brody; and the Law Offices of Joseph H. Weiss;

u. "Proof of Claim" means a proof of claim form in substantially the form attached hereto as Exhibit C and as approved by the Court;

v. "Policy" means that certain Directors and Officers Liability and Corporate Reimbursement Policy No. 435-03-66 issued by National Union.

w. "Released Claims" means (i) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reason of any matter, cause or

thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast Securities, by a Class Member; and (ii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Class Member had, has, or may in the future have that are or could have been alleged in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast;

x. "Released Parties" means the Defendants, and their respective spouses, heirs, executors, administrators, successors and assigns; National Union and any other insurers that provide directors' and officers' liability insurance to Southeast, and their directors and officers; and all former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, consultants, affiliates, independent contractors and associates (as defined in SEC Rule 12b-2, promulated pursuant to the Securities Exchange Act of 1934) of Southeast and their respective spouses, heirs, executors, administrators, successors and assigns, except that any Class Member who files a Proof of Claim seeking to benefit from the Settlement Funds shall not be a Released Party;

y. "Settlement Administrator" means and shall be the firm of Rudolph, Palitz, Certified Public Accountants, 620 West Germantown Pike, Suite 400, Plymouth Meeting, Pennsylvania 19462;

z. "Settlement Effective Date" means the date by which all of the following conditions have occurred:

i. final approval by the Court of the Settlement;

ii. entry of the Final Order and Judgment thereon;

iii. expiration of the time for appeal for such Final Order and Judgment or, if any appeal is taken, the expiration of three days after final determination, not subject to further review, appeal or petition for rehearing, of such appeal by the highest court before which appellate review is or could be sought;

iv. final resolution of such appeal, if any, and entry of a final judgment in such manner as to permit the consummation of this Settlement in accordance with all of its terms and conditions, not subject to termination as a result of the contingencies set forth in this Stipulation;

aa. "Settlement Funds" means $5,000,000 in cash, plus interest accrued thereon, to be paid by National Union under the Policy and on behalf of Defendants pursuant to paragraphs B.2.a and B.3 hereof. Interest shall accrue at a rate of 2.5% per annum (simple interest) on that portion of the Settlement Funds not distributed to Plaintiffs' Lead Counsel for Notice and Administration Expenses, from the date of the Court's Hearing Order preliminarily approving this Stipulation until payment of all remaining Settlement Funds to the Settlement Administrator in accordance with paragraph B.2 below, provided that if the Stipulation or Settlement is terminated by Plaintiffs' Lead Counsel, Defendants' Representative Counsel or National Union as provided herein, no interest shall accrue on the Settlement Funds;

ab. "Settlement Hearing" means the hearing to be held by the Court to consider final approval of the Settlement pursuant to Fed. R. Civ. P. 23;

ac. "Stipulation" and/or "Settlement" mean this Stipulation of Settlement and the Exhibits attached hereto and incorporated herein by reference;

ad. "Southeast Securities" and/or "Southeast's Securities" mean any and all securities issued by Southeast and publicly

traded during the Class Period, including but not limited to common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and/or securitized asset interests;

ae. "Southeast" means Southeast Banking Corp. and its present or former corporate parents, subsidiaries (including Southeast Bank), predecessors, successors, and assigns;

af. "Southeast Bank" means Southeast Bank, N.A.;

ag. "Summary Notice" means the printed summary of the Notice, to be published substantially in the form of Exhibit D in accordance with this Stipulation;

ah. "Termination Date" means the date on which a party to this Stipulation sends written notice of termination as provided herein; and

ai. "Unknown Claims" means any existing or future claims, demands, causes of action or rights, against any Released Party that the Class Members do not know or suspect to exist in their favor at the time the Final Order and Judgment is entered in this litigation, provided that such claim(s) would arise out of, or relate to Southeast, including the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast's Securities.

2. All other capitalized terms used herein shall have the meaning ascribed to them by this Stipulation.

B. *The Settlement*

1. The obligations incurred pursuant to this Stipulation shall be in full and final disposition and settlement of any and all Released Claims (whether assertable on behalf of the Class or individual Class Members) against the Released Parties by Plaintiffs and the Class Members, or any of them.

2. Within ten (10) business days following the Settlement Effective Date, National Union shall pay on behalf of Defen-

dants and pursuant to the Policy, by check made to the order of the Settlement Administrator, the Settlement Funds, less any amount already paid by National Union to Plaintiffs' Lead Counsel for Notice and Administration Expenses.

3. a. Within ten (10) business days after preliminary approval of the Stipulation by the Court in its Hearing Order, National Union shall pay, by check made payable to Chimicles, Burt, Jacobsen & McNew, on behalf of Defendants pursuant to the Policy, $100,000 of Settlement Funds, to establish the Notice and Administration Fund for initial Notice and Administration Expenses. The costs of administering the Settlement and the Settlement Funds shall be charged solely against the Settlement Funds, including the Notice and Administration .Fund, as provided for herein.

b. Plaintiffs' Lead Counsel shall disburse funds from the Notice and Administration Fund in payment of reasonable Notice and Administration Expenses authorized hereunder which are incurred in connection with carrying out the terms and conditions of the Stipulation. Plaintiffs' Lead Counsel shall be responsible for maintaining accurate records of all expenditures made for such purposes.

c. Plaintiffs' Lead Counsel shall be authorized to withdraw funds from the Notice and Administration Fund to pay Notice and Administration Expenses up to a maximum of $100,000 (plus accrued interest), without further approval of the Court or any other signatory to this Stipulation. To the extent that such costs do not exceed $100,000, plus interest earned thereon, any amount remaining unexpended shall be held by Plaintiffs' Lead Counsel and added to the amount of Settlement Funds paid to the Settlement Administrator pursuant to paragraph B.2 hereof.

d. To the extent Notice and Administration Expenses exceed the amount available in the Notice and Administration Fund, Plaintiff's Lead Counsel may request the transfer of additional Settlement Funds into the Notice and Administration Fund (an "Excess Distribution"). Any such request

shall be (i) made in a minimum amount of $10,000 per request; (ii) accompanied by invoices or other appropriate documentation and a reasonable explanation of the basis for the request; and (iii) made to National Union if the request is made prior to the Settlement Effective Date; or (iv) made to the Court if the request is made after the Settlement Effective Date.

e. Any request for an Excess Distribution made prior to the Settlement Effective Date must be approved by National Union, which approval shall not unreasonably be withheld. If a disagreement arises between National Union and Plaintiffs' Lead Counsel regarding an Excess Distribution, the matter may be submitted to the Court for resolution by either party, and both parties shall be bound by the Court's ruling.

f. After the Settlement Effective Date, Plaintiffs' Lead Counsel may request that the Court approve additional Excess Distributions. The Settlement Administrator shall make any distribution of Settlement Funds into the Notice and Administration Fund approved by the Court.

4. In the event that Settlement Funds are not paid as required by paragraphs B.2 or B.3.a above, Plaintiffs' Lead Counsel shall have the unilateral option to terminate the Settlement by sending a notice, in writing, by telecopy and overnight express mail, to Defendants' Representative Counsel and National Union.

5. a. If the Settlement does not become effective as defined below, or is terminated by Plaintiffs' Lead Counsel, Defendants' Representative Counsel or National Union as provided herein, Plaintiffs' Lead Counsel shall transfer to National Union, by wire transfer within ten (10) business days after the Termination Date, such funds as are then remaining in the Notice and Administration Fund, including interest earned thereupon, after all out-of-pocket paid or accrued expenditures for Notice and Administration Expenses have been deducted therefrom.

b. National Union shall have no obligation to pay Settlement Funds hereunder to Plaintiffs' Lead Counsel or otherwise, upon the occurrence of the Termination Date. However, this paragraph B.5.b shall not be construed to require Plaintiffs' Lead Counsel to reimburse National Union for Settlement Funds previously expended (paid or accrued) for Notice and Administration Expenses at the time of the Termination Date, as set forth in paragraph B.5.a above.

6. The amount of Attorneys' Fees and Expenses, as determined by the Court at the Settlement Hearing or thereafter, paid from the Settlement Funds by the Settlement Administrator by wire transfer and in the amount determined by the Court, together with accrued interest thereon, beginning on the date of such determination by the Court, within three (3) business days after the Settlement Funds are transferred by National Union to the Settlement Administrator as provided in paragraph B.2 above. Except to the extent that the Court authorizes the use of Settlement Funds for the payment of Attorneys' Fees and Expenses, the Defendants and National Union shall have no obligation whatsoever with respect to any attorneys' fees or other expenses of Plaintiffs' Lead Counsel, other plaintiffs' counsel, counsel for any Class Member or any experts retained on behalf of Plaintiffs or Class Members, or any other costs, fees and/or expenses whatsoever of any party to this litigation or any Class Member.

7. Prior to distribution of the Net Settlement Funds to Authorized Claimants, Plaintiffs' Lead Counsel shall seek and obtain authorization from the Court for distribution of the Net Settlement Funds, as well as for the payment of any remaining expenses chargeable against the Settlement Funds.

8. As soon as practicable after this Stipulation has been executed, the parties shall jointly apply to the Court for an Order with Respect to Class Certification (substantially in the form attached hereto as Exhibit A-1) and an Order with Respect to Notice, Settlement Hearing and Administration

(substantially in the form attached hereto as Exhibit A-2) (the "Hearing Order"), which Orders shall provide, *inter alia*, as follows:

a. Certifying a Class, solely for purposes of settlement, consisting of all persons who purchased or otherwise acquired Southeast Securities during the Class Period.

b. Directing that a Settlement Hearing be held no sooner than 75 days after the date of the Hearing Order. Such Settlement Hearing shall be held for the purpose of determining whether the Settlement and Stipulation should be approved as fair, reasonable, adequate, and in the best interests of the Class, and whether judgment should be entered dismissing the Litigation on the merits and with prejudice in accordance with the terms of this Stipulation; and in the event that the Court approves this Settlement, to pass upon the application of Plaintiffs' Lead Counsel for Attorneys' Fees and Expenses, and the application for Individual Awards to Named Plaintiffs; and to hear and determine such other matters as the Court may deem appropriate;

c. Providing that notice of this Settlement and of the Settlement Hearing be given at the direction of the Court to all persons who are members of the Class, as follows:

i. Requiring that notice to all Class members shall be given by Plaintiffs' Lead Counsel by mailing a copy of the Notice, substantially in the form attached hereto as Exhibit B, and the Proof of Claim and Release ("Proof of Claim"), substantially in the form attached hereto as Exhibit C, to the addresses appearing on such records previously maintained by Southeast's former transfer agent, or such other entity presently maintaining such records, and reasonably made available to Plaintiffs' Lead counsel;

ii. Requiring that notice to Class Members shall also be provided by directing Plaintiffs' Lead Counsel to publish a Summary Notice substantially in the form annexed hereto as

Exhibit D. The Summary Notice shall be published once each in the national editions of *The Wall Street Journal* and in the business section of the *Miami Herald*, approximately one week following the mailing of the Notice;

d. Requiring the filing of a sworn statement by Plaintiffs' Lead Counsel or his designee, prior to the Settlement Hearing, or mailing of the Summary Notice as required in the Hearing Order;

e. Determining that the notices described in paragraph B.8.c. above constitute the best notice practicable under the circumstances and constitute due and sufficient notice of the Settlement Hearing and proposed Settlement to all persons affected by and/or entitled to participate in the Settlement;

f. Providing that under no circumstances shall the Defendants, their counsel or their insurers be required to give or fund, other than by payment of the Settlement Funds, any Notice to the Class Members, including the notice contemplated in the Hearing Order;

g. Providing that, for settlement purposes only, the allegations in Plaintiffs' Fourth Consolidated Amended and Supplemental Complaint relating to the Class and Class Period shall be deemed amended by interlineation to be consistent with the definitions in this Stipulation;

h. Granting, for purposes of settlement only, Plaintiffs' motion to substitute the Estate of Harry Hood Bassett as a party defendant for Harry Hood Bassett; and

i. Providing for the other matters set forth in Exhibit A-2.

C. *Processing and Determination of Claims*

1. For purposes of determining the extent, if any, to which a Class Member shall be an Authorized Claimant, the following conditions shall apply:

a. Each Class Member shall be required to submit a Proof of Claim supported by such documents as are specified therein, or such additional documents or proof as Plaintiffs' Lead Counsel or the Settlement Administrator, in their discretion, may deem necessary.

b. All Proofs of Claim must be submitted to the Settlement Administrator by the date specified in the Proof of Claim unless such period is extended by Order of the Court. Any Class Member who is not entitled to file a Proof of Claim or who fails to file a Proof of Claim by such date shall be forever barred from receiving any payment pursuant to this Stipulation or the Final Order and Judgment (unless, by Order of the Court, a later filed Proof of Claim by such Class Member is approved prior to the Date of Distribution) but shall in all other respects be bound by the terms of this Stipulation and by the contained herein and the Final Order and Judgment entered in the Litigation. A Proof of Claim must be received by the Settlement Administrator or postmarked on or before the date specified in the Notice in order to be deemed timely.

c. Each Proof of Claim shall be submitted to and reviewed by the Settlement Administrator who shall determine, under the supervision of Plaintiffs' Lead Counsel, and in accordance with this Stipulation and the Hearing Order, the extent, if any, to which each claim shall be allowed (the "Recognized Loss"), subject to final review by the Court. Copies of submitted Proofs of Claim shall be made available to Defendants' Representative Counsel for examination at their expense and upon their request. Following the Date of Distribution, the Settlement Administrator shall retain all Proofs of Claim and other related documents for a period of one (1) year, at which time all Proofs of Claim and other related documents may be destroyed or, at their expense and option, delivered to Defendants.

d. The Settlement Administrator shall reject Proofs of Claim that do not meet the requirements set forth herein and in the Hearing Order. The Settlement Administrator shall

notify all Claimants whose Proofs of Claim have been rejected in whole or in part, setting forth the reasons therefor, and shall indicate in such notice that the Claimant whose claim is rejected finally has a right of review by the Court provided the Claimant complies with the requirements set forth herein and the Hearing Order.

e. Any Claimant whose claim has been finally rejected in whole or in part, and who desires to contest such final rejection must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim, serve upon Plaintiffs' Lead Counsel a notice and statement of reasons indicating the Claimant's grounds for contesting the final rejection along with any supporting documentation. Any such notice and statement shall be deemed served when actually received by Plaintiffs' Lead Counsel. Plaintiffs' Lead Counsel shall thereafter present any such notice along with a response, if desired, for review and final decision by the Court. Defendants shall not have standing to assert any position with respect to the acceptance or rejection of submitted Proofs of Claims or with respect to any controversy arising therefrom.

2. Each Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claimant's claim, and the Claimant will be subject to discovery under the Federal Rules of Civil Procedure, limited to the Claimant's status as a Class Member, the amount and circumstances of the Claimant's claim, and the contents of the Proof of Claim as submitted.

3. All proceedings with respect to the Settlement described by this Stipulation and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of claims, shall be subject to the continuing jurisdiction of the Court.

4. The Settlement Administrator, acting on behalf of the Class, and subject to the supervision, direction and approval

of Plaintiffs' Lead Counsel and the Court, shall review the Proofs of Claim, administer and calculate the claims submitted by Class Members and shall oversee distribution of that portion of the Settlement Funds that is finally awarded by the Court to Authorized Claimants.

5. It is agreed that the proceedings relating to, and the allowances or disallowances of, any Proof of Claim are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to terminate or cancel this Stipulation or to affect its finality and enforceability.

D. *Calculation and Payment of Claims*

1. On or after the Settlement Effective Date, National Union shall transfer the remaining Settlement Funds to the Settlement Administrator as provided in paragraph B.2 above. The Settlement Administrator shall then apply the Settlement Funds as follows:

a. Subject to the approval and further order(s) of the Court, to pay Plaintiffs' Lead Counsel, on behalf of all plaintiffs' counsel, their Attorneys' Fees and Expenses from the Settlement Funds if and to the extent allowed by the Court. The fees and expenses awarded shall be delivered to Plaintiffs' Lead Counsel within three (3) business days after the funds are transferred to the Settlement Administrator. In the event that the order awarding Attorneys' Fees and Expenses is reversed or modified on appeal, and in the event that the Attorneys' Fees and Expenses awarded have been delivered to any extent, then Plaintiffs' Lead Counsel shall promptly refund any amounts received under such order (plus interest earned thereon, if any) consistent with the reversal or modification. It is agreed that the proceedings for, and the allowance or disallowance by the Court of, any applications by any of the counsel to the plaintiffs for Attorneys' Fees and Expenses are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to

terminate or cancel this Stipulation or to affect its finality and enforceability;

b. To pay to Plaintiffs' Lead Counsel such amounts, if any, as may be awarded as Individual Awards to Named Plaintiffs;

c. To pay all Notice and Administration Expenses, and any taxes that may become due, if any, on the Settlement Funds which remain unpaid after the exhaustion of the Notice and Administration Fund;

d. After payment of the foregoing amounts, to pay *pro rata* that portion of the Net Settlement Funds represented by a fraction (of which the individual Recognized Loss of such Authorized Claimant is the numerator, and the sum of all Recognized Losses of all Authorized Claimants is the denominator) in the manner (the amount so allocated to each Authorized Claimant constituting his or her "Payable Claim") described in the Plan of Allocation attached hereto as Exhibit F;

No order or other proceeding relating to the Plan of Allocation, including any order modifying the Plan of Allocation or establishing a different Plan of Allocation, shall operate to terminate or change this Stipulation or to affect its finality or the finality of the Court's judgment.

2. Payment in the manner set forth above shall be deemed conclusive as to the claims of all Class Members. Class Members who do not timely submit Proofs of Claims or whose Proofs of Claims are not approved shall be barred from participating in distributions from the Settlement Funds, unless the Court orders otherwise, but in all other respects shall be bound by the terms and conditions of this Stipulation, including the terms and conditions of the release contained herein and the Final Order and Judgment entered in the Litigation.

E. *Final Order and Judgment*

1. At or prior to the Settlement Hearing, the parties shall submit to the Court on consent a proposed Final Order and Judgment, substantially in the form annexed hereto as Exhibit E, providing, among other things, as follows:

a. Approving the Settlement, as provided herein, as fair, reasonable, adequate and in the best interests of the Class, and directing the parties to consummate the Settlement in accordance with all of its terms and conditions;

b. Finding that the payment by National Union of the Settlement Funds under the Policy is in good faith and that such payment should be authorized and approved by the Court, even though such payment will deplete the Policy

c. Dismissing the Litigation with prejudice and on the merits, without costs, and extinguishing all Released Claims;

d. Permanently barring and enjoining Plaintiffs and each and every member of the Class from asserting, either directly, individually or in a representative capacity, against any of the Released Parties, any Released Claim or any claim, right, demand or cause of action which could have been asserted based upon a Released Claim; and

e. Reserving jurisdiction, without affecting the finality of the judgment with respect to the foregoing matters, over all matters relating to the administration, consummation, construction and enforcement of the Settlement provided for herein.

F. *Contingencies, Effect of Disapproval or Termination of Settlement*

1. The parties agree that Defendants or National Union shall have the unilateral option to terminate this Stipulation and cancel the Settlement in the event that Class Members who experienced an aggregate market loss with respect to Southeast Securities in excess of the "Exclusion Threshold"

mutually agreed upon between Plaintiffs' Lead Counsel, Defendants' Representative Counsel and National Union, request exclusion from the Class pursuant to the provisions set forth in the Notice or Summary Notice. Within seven (7) business days following the expiration of the last date for requesting exclusion (the "Exclusion Date"), Defendants' Representative Counsel shall notify in writing, by telecopier and by overnight express mail, National Union of the names of persons, if any, who have requested such exclusion and the type and number of securities for which each is claiming exclusion, if such information has been provided. Should Defendants or National Union wish to terminate this Settlement based upon the Exclusion Threshold having been exceeded, such termination will be effective if the Defendants' Representative Counsel or National Union notifies Plaintiffs' Lead Counsel in writing, by telecopier and by overnight mail, of the exercise of such option to terminate not later than five (5) business days following National Union's receipt from Defendants' Representative Counsel of notification of the names of persons who have requested exclusion from the Class and other information required in this paragraph F.1., and not less than five (5) business days prior to the Settlement Hearing.

2. This Settlement and the consideration therefor are offered and given in return for and are expressly contingent upon the releases described herein and upon the Defendants and their insurance carriers receiving a full and final dismissal, with prejudice, approved by the Court, and not subject to further appeal by any person, with respect to all Released Claims against all Released Parties.

3. In the event that the Court, without the consent of Plaintiffs' Lead Counsel, Defendants' Representative Counsel and National Union, modifies or refuses to approve any part of this Settlement, Plaintiffs' Lead counsel, Defendants' Representative Counsel or National Union may terminate this Stipulation and the Settlement by giving all other parties writ-

ten notice, by telecopier and by overnight express mail, of the termination no later than ten (10) days following the date of the order disapproving or modifying this Settlement or Stipulation. For purposes of this provision and the next succeeding paragraph, the fact that Attorneys' Fees and Expenses or Individual Awards to Named Plaintiffs awarded by the Court for payment from Settlement Funds are in an amount different from that sought, or that such awards are denied in total, shall not be deemed a refusal to approve or a modification of the Settlement.

4. In the event the Court approves the Stipulation and Settlement and an appeal is taken from the Court's action, Defendants, National Union or Plaintiffs shall have the right to terminate the Stipulation and the Settlement if, on appeal, the Stipulation or Settlement is disapproved or modified by the Court of Appeals or any other court.

5. If this Stipulation or the Settlement is terminated for any reason whatsoever, then, in that event, within ten (10) business days following the Termination Date, Plaintiffs' Lead Counsel shall cause to be returned to National Union any amounts National Union previously paid into the Notice and Administration Fund, together with all interest accrued thereon, less any payments made to date and/or accrued for the incurred costs of Notice and Administration Expenses, which amounts shall be deducted from the amount to be returned.

6. If the Settlement is terminated for any reason whatsoever, this Stipulation shall be null and void, shall have no further force and effect whatsoever, and shall not be admissible or otherwise used in any manner in the Litigation or in any other proceeding for any purpose and the Class Members and Defendants shall be relegated to their respective rights as if no settlement had been agreed to.

G. *Fee Application*

1. All plaintiffs' counsel, by and through Plaintiffs' Lead Counsel, will apply to the court for awards of Attorneys' Fees and Expenses from the Settlement Funds for services rendered in connection with the Litigation and the Settlement thereof. Any payment of Attorneys' Fees and Expenses shall be paid to Plaintiffs' Lead Counsel on behalf of all plaintiffs' counsel upon Court approval from the Settlement Funds after the Settlement Effective Date. Except to the extent that the Court orders Attorneys' Fees and Expenses to be paid from the Settlement Funds, in no event shall any of the Defendants or National Union have any responsibility or liability for any fees, costs or expenses, including attorneys' or experts' fees or costs, related to the Litigation. Defendants and National Union shall make no submission nor take any position with respect to the application of Plaintiffs' Lead Counsel, unless such fee application exceeds 25% of the Settlement Funds, in which event Defendants or National Union may, at their discretion, make a submission to the Court registering their position with regard to the fee application. Notwithstanding any provision contained herein, the costs of Notice and Administration Expenses, as approved by the Court, may be paid from the Settlement Funds in accordance with the provisions hereof.

H. *Stipulation Is Not An Admission*

1. This Stipulation and each of its provisions and any prior drafts thereof and the Settlement provided for herein, whether or not consummated or later terminated, and any statements, negotiations, proceedings, or agreements relating to the Stipulation, or any matter arising in connection with such statements, negotiations, proceedings, or agreements are not and shall not in any event be:

a. construed as or deemed to be evidence or a presumption of, or a concession or admission by, any of Defendants or the

Released Parties of the truth of any fact, including (*i*) any fact alleged or the validity of any claim which has been asserted or could have been asserted in the Litigation, (*ii*) of the deficiency of any defense that has or could have been asserted in the Litigation, or (*iii*) of any liability, fault, wrongdoing or otherwise of Defendants or Released Parties; or

b. admissible as evidence or offered or received as evidence or as a presumption, concession, or an admission of any actual or potential fault, misrepresentation or omission in any statement or written document, report or financial statement heretofore issued, filed, approved or made by any of Defendants or Released Parties; or

c. admissible as evidence or offered or received as evidence or as a presumption, concession, or an admission of any actual or potential liability, fault or wrongdoing or in any way referred to for any other reason against any of Defendants or Released Parties in the Litigation or in any other civil, criminal or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce this Stipulation or the Settlement; or

d. construed by anyone for any purpose whatsoever as a presumption, concession or an admission of any liability, fault, wrongdoing or otherwise on the part of any of the Defendants or Released Parties; or

e. construed as a concession or an admission that Plaintiffs and the Class Members or any of them have in fact suffered any damage; or

f. construed as an admission or concession that any combination of the Class Members constitute or could constitute a class for purposes of Federal Rule of Civil Procedure 23; or

g. construed as an admission or concession by anyone that the consideration to be given hereunder represents the amount which could be recovered after trial.

I. *Releases*

1. Upon final approval by the Court of the Settlement described in this Stipulation, and subject to the contingencies set forth above, Plaintiffs, all Class Members, and their respective heirs, executors, administrators, partners, directors, officers, employees, representatives, agents, successors and assigns of each of them, shall conclusively be deemed to have remised, released and discharged, absolutely and forever, each and all of the Released Parties of and from any and all Released Claims, including any and all manner of claims, actions, causes of action in law or equity, suits, obligations, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys' fees whatsoever, known or unknown, whether based on any federal law, state law, or common law right of action or otherwise, which the Plaintiffs, the Class or the Class Members, or any of them, ever had, now have or could have, or shall or may hereafter have (either individually or as a Class Member) by reasons of, based upon, in connection with, arising out of, or which are in any way related to the Released Claims.

J. *Miscellaneous Provisions*

1. All parties to this stipulation and all of their attorneys agree to cooperate fully with one another in seeking Court approval of the Stipulation and to use their best efforts to effect consummation of this Stipulation and the Settlement provided for herein. Defendants will take no position with respect to the Plan of Allocation, or the reimbursement of any costs.

2. Plaintiffs' Lead Counsel shall be permitted to conduct additional discovery into loan loss reserve committee meeting minutes, monthly and quarterly reports to management and the board of directors regarding classified assets, and internal auditors' reports regarding classified assets and loan loss reserves. Plaintiffs and Defendants agree that no addi-

tional discovery shall be taken unless this Settlement is terminated.

3. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of this Stipulation and any actions pertaining to the Notice, the Summary Notice and the administration of Proofs of Claim.

4. The Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns and any corporation, partnership or other entity into or with which any party hereto may merge, consolidate, or reorganize.

5. All of the exhibits to this Stipulation are an integral part of this Stipulation and are incorporated into the agreement of the parties to this Stipulation as though fully set forth herein.

6. This Stipulation, as well as any of its exhibits, may be executed in one or more original or telecopied counterparts, all of which such counterparts together shall be one instrument, and all of which shall be considered duplicate originals.

7. The Class Representatives, Plaintiffs' Lead Counsel, other plaintiffs' counsel and any experts, consultants or other persons engaged by them to assist in the prosecution of the Litigation, represent and agree that they shall abide by, and continue to abide by, any agreements or orders concerning the confidentiality of discovery and other materials produced by the Defendants or otherwise, and further represent and agree that all agreements made during the course of the Litigation relating to the confidentiality of information shall survive the consummation of this Settlement and the entry of the Final Order and Judgment thereon.

8. National Union agrees to submit to the jurisdiction of the Court for the limited purpose of enforcement of the terms of this Settlement. Any notice sent to National Union pursuant to this Stipulation shall be sent to:

National Union Fire Insurance
Company of Pittsburgh, PA
c/o D'Amato & Lynch
Attn: Harry J. Arnold, Jr., Esquire
70 Pine Street
New York, New York 10270
(212) 425-2070 (fax)

9. The foregoing, including all of the exhibits appended hereto, constitutes the entire agreement of the parties with respect to the subject matter hereof, and may not be modified or amended except in a writing signed by all parties hereto.

10. The waiver by one party of any breach of this Stipulation by any other party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation, any such waiver to be enforceable only if in a writing delivered to the other parties to this Stipulation.

11. Plaintiffs' Lead Counsel on behalf of the Class has been expressly authorized by their clients and the Court to enter into this Stipulation on behalf of the Class, to bind them thereby, and to take all appropriate action required or permitted to be taken by the Class pursuant to this Stipulation to effectuate its terms, and also is expressly authorized to enter into any modification or amendments to this Stipulation on behalf of the Class. Any notice or funds sent to Plaintiffs' Lead Counsel pursuant to this Stipulation shall be sent to:

Michael J. Pucillo, Esquire
Chimicles, Burt, Jacobsen & McNew
Esperanté, Suite 960
222 Lakeview Avenue
West Palm Beach, Florida 33401
(407) 835-0322 (fax)

12. Defendants' Counsel, on behalf of the Defendants, have been expressly authorized by the Defendants to enter into this Stipulation on their behalf, to bind them thereby, and

to take all appropriate action required or permitted to be taken by Defendants pursuant to this Stipulation to effectuate its terms. Any notice sent to Defendants' Representative Counsel pursuant to this Stipulation shall be sent to:

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2398
(305) 358-1418 (fax)

and

Robert T. Wright, Jr., Esquire
Mershon, Sawyer, Johnston,
Dunwody & Cole
Suite 4500, First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2387
(305) 376-8654 (fax)

except that Requests for Exclusion shall be mailed only to Lewis F. Murphy, P.A.

13. This Stipulation and the Exhibits hereto shall be governed and interpreted in accordance with the substantive laws of the State of Florida, without regard to any choice of law rules or provisions.

IN WITNESS WHEREOF, the Stipulation has been executed by the undersigned counsel of record as of the date set forth below.

DATED: August 19, 1993.

CHIMICLES, BURT, JACOBSEN
& MCNEW

By: MICHAEL J. PUCILLO
MICHAEL J. PUCILLO
Fla. Bar No.: 261033
WENDY H. ZOBERMAN
Fla. Bar No.: 434670
Esperanté, Suite 960
222 Lakeview Avenue
West Palm Beach, FL 33401
(407) 835-9400

STULL, STULL & BRODY

By: _____
JULES BRODY
MARK LEVINE
6 East 45th Street
New York, NY 10017
(212) 687-7230

LAW OFFICES OF JOSEPH H. WEISS

By: _____
JOSEPH H. WEISS
319 Fifth Avenue
New York, NY 10016
(212) 532-4171

Plaintiffs' Lead Counsel

IN WITNESS WHEREOF, the Stipulation has been executed by the undersigned counsel of record as of the date set forth below.

DATED: August 19, 1993.

CHIMICLES, BURT, JACOBSEN
& MCNEW

By: _____
MICHAEL J. PUCILLO
Fla. Bar No.: 261033
WENDY H. ZOBERMAN
Fla. Bar No.: 434670
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STULL, STULL & BRODY

By: MARK LEVINE
JULES BRODY
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(212) 687-7230

LAW OFFICES OF JOSEPH H. WEISS

By: JOSEPH H. WEISS/MEL
JOSEPH H. WEISS
319 Fifth Avenue
New York, NY 10016
(212) 532-4171

Plaintiffs' Lead Counsel

STEEL HECTOR & DAVIS

By: LEWIS F. MURPHY
LEWIS F. MURPHY, P.A.
200 S. Biscayne Blvd.
Miami, FL 33131-2398
(305) 577-7000

Attorneys for Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne and Douglas E. Ebert

and

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE

By: ROBERT T. WRIGHT, JR.
ROBERT T. WRIGHT, JR.,
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A.I. MANAGEMENT AND PROFESSIONAL LIABILITY CLAIM ADJUSTERS, on behalf of NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

By: _____

STEEL HECTOR & DAVIS

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and

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE

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Attorneys for Defendant Florence Schust Bassett, as Personal Representative of the Estate of Harry Hood Bassett

A.I. MANAGEMENT AND PROFESSIONAL LIABILITY CLAIM ADJUSTERS, on behalf of NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

By: WILLIAM JACOBI
William Jacobi
Assistant Vice President

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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MASTER FILE
Filed August 27, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

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IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

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THIS DOCUMENT RELATES TO ALL ACTIONS

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ORDER WITH RESPECT TO NOTICE, SETTLEMENT HEARING AND ADMINISTRATION

Upon review and consideration of the Stipulation of Settlement dated August 19, 1993, and the exhibits annexed thereto (the "Stipulation"), executed on behalf of Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust ("Plaintiffs"), and Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett ("Defendants"), in the above-captioned litigation (the "Litigation"); and as a hearing on the proposed Settlement described in the Stipulation is necessary;

NOW, upon the application of Plaintiffs and Defendants, it is hereby ORDERED as follows:

1. The terms of the Stipulation and the Settlement provided for therein are preliminarily approved, subject to further consideration thereof at the Settlement Hearing described at paragraph 11 of this Order. For purposes of this Order, the Court adopts and incorporates the definitions set forth in the Stipulation.

2. As soon as practicable after the entry of this Order, but no later than ten (10) business days from this date, Plaintiff's Lead Counsel shall, as a Notice and Administration Expense as defined in the Stipulation, cause Southeast Banking Corp.'s former transfer agent or such other entity presently maintaining such records to provide a list of all readily identifiable members of the Class as they may appear on the records of such transfer agent or other entity (the "List") (on computer disks or other computer readable form, if available) to Plaintiffs' Lead Counsel (or his designee). Following receipt of the List, Plaintiffs' Lead Counsel (or his designee) shall provide notice of this Settlement and of the Settlement Hearing to all Class Members, as follows:

(a) to all potential Class Members who can be identified from the List, by mailing a copy of the Notice of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear ("the Notice"), substantially in the form attached to the Stipulation as Exhibit B, and the Proof of Claim and Release ("Proof of Claim"), substantially in the form attached to the Stipulation as Exhibit C; and

(b) by causing to be published, approximately one week following the initial mailing of the Notice, a Summary Notice, substantially in the form annexed to the Stipulation as Exhibit D, once each in the national edition of *The Wall Street Journal*, and in the business section of the *Miami Herald*.

3. As set forth in the Notice, all Nominees who held Southeast Securities of record for Class Members and who have not previously supplied the Settlement Administrator with the names and addresses of such Class Members are directed, as agents of such Class Members, either (*a*) to supply the Settlement Administrator with a list of the names and addresses of such beneficial holders, or (*b*) to forward copies of the Notice and Proof of Claim to the beneficial owners of such securities and to submit a sworn statement to Plaintiffs' Lead Counsel at a Post Office Box address to be designated by the Settlement Administrator as provided below, that they have done so, which statement shall contain a list of the names and addresses of such beneficial holders. Upon full compliance with this Order, such Nominees may seek reimbursement of their reasonable and actual out-of-pocket expenses in complying with this Order by submitting to the Settlement Administrator, made under penalty of perjury in affidavit or declaration form, a statement itemizing all such expenses and stating, in substance, that the foregoing expenses would not have been incurred but for compliance with this Order, except that no reimbursement will be made for service charges, handling fees, excess postage or similar charges. Additional copies of the Notice and Proof of Claim for transmittal to beneficial owners shall be made available by Plaintiffs' Lead Counsel upon written request to the Settlement Administrator at a Post Office Box address as designated therein.

4. The reasonable and verifiable costs and expenses of obtaining a list of all readily identifiable members of the Class, identifying and notifying Class Members, printing, preparing and mailing the Notice, reviewing and processing Proofs of Claim, including complying with the instructions addressed to the Nominees, assisting the making of claims, soliciting the revocation of requests for exclusion, and publishing the Summary Notice, along with the reasonable costs and expenses of administering the settlement and the Settlement Funds, shall be paid from the Notice and Administration Fund and, if necessary, from Settlement Funds pursuant to the

terms of the Stipulation. Under no circumstances shall the Defendants, their counsel, or their insurers be required to give or fund, other than by payment of Settlement Funds into the Notice and Administration Fund, as provided in paragraph B.3 of the Stipulation, any notice to Class members.

5. At least 5 days prior to the hearing described in paragraph 11, Plaintiffs' Lead Counsel, the Claims Administrator, or one of their designees shall serve and file a sworn statement evidencing compliance with the provisions of paragraph 2 of this Order concerning the mailing of the Notice and the Proofs of Claim, and concerning the publication of the Summary Notice.

6. Notice in compliance with the provisions set forth in paragraph 2 and paragraph 3 above is hereby found to be the best notice practicable under the circumstances, and constitutes due and sufficient notice of this Order to all persons affected by and/or entitled to participate in the Settlement, in full compliance with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure.

7. Any Class Member desiring exclusion from the Class shall mail a request for exclusion ("Request for Exclusion") to Lewis F. Murphy, P.A., 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398, postmarked not later than 30 days before the hearing described in paragraph 11. Such request shall set forth: (*i*) the name, address and telephone number of the Class Member; (*ii*) the number of securities by type, with the dates and prices of trades of such Southeast Securities beneficially owned during the Class Period; and (*iii*) the name and address of the person in whose name the securities were registered. Failure to provide the necessary information shall invalidate any Request for Exclusion unless the information is subsequently provided in writing to Defendants' Representative Counsel no later than the last day by which Requests for Exclusion must be postmarked. Requests for Exclusion shall be deemed to have been made in each and every capacity in which the per-

son requesting the exclusion is acting with respect to such Class Member. Any Class Member who does not properly and timely request exclusion shall be included in the Class and shall be bound by any Final Judgment entered in this Litigation even if such Class Member does not submit a timely Proof of Claim.

8. To effectuate the Settlement and the notice provided for in paragraph 3 hereof, Plaintiffs' Lead Counsel has appointed a Settlement Administrator, the firm of Rudolph, Palitz, Certified Public Accountants, 620 West Germantown Pike, Suite 400, Plymouth Meeting, Pennsylvania 19462, which firm shall lease and maintain a post office box of adequate size for the return of Proofs of Claim. All Notices to the Class shall designate said post office box as the return address for Proofs of Claim. The Settlement Administrator shall be responsible for the receipt of all responses from Class Members (except Requests for Exclusion) and Nominees, and shall preserve all entries of appearance, Proofs of Claim, and any and all other written communications from Class Members, the Nominees, or any other person in response to said notice until one year following the Date of Distribution as defined in the Stipulation or pursuant to Order of the Court. All written communications received from Class Members or Nominees (including submitted Proofs of Claim) and all written responses to inquiries by Class Members or Nominees relating to this Stipulation and Settlement shall be available at all reasonable times for inspection and copying by Defendants' Representative Counsel and Plaintiffs' Lead Counsel, subject to further order of the Court if issues of privilege or confidentiality arise. All mailed notices to the Class shall designate Defendants' Representative Counsel Lewis F. Murphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398 as the person to whom Requests for Exclusion shall be sent. Defendants' Representative Counsel shall file with the Court a list of all those who have submitted Requests for Exclusion no

later than seven (7) business days following the last business day on which Requests for Exclusion must be postmarked.

9. In order to be deemed an Authorized Claimant entitled to participate in the Net Settlement Funds, as defined in the Stipulation, in the event the Settlement is effected in accordance with all of the terms and conditions thereof, Class Members must take the following actions and shall be subject to the following conditions:

(a) A properly executed and verified Proof of Claim must be submitted to the Settlement Administrator, at the Post Office Box indicated in the Notice, on or before 40 days after the hearing described in paragraph 11. Each Proof of Claim shall be deemed to have been submitted timely if received or postmarked on or before 40 days after the hearing described in paragraph 11.

(b) As part of the Claimant's Proof of Claim, each Class Member shall (subject to effectuation of the Settlement) release all claims as provided in the Stipulation. However, failure to file this Release shall not affect the validity of the Release set forth in the Stipulation, or which may be incorporated into this Court's final judgment, which shall bind all Class Members except those who have been excluded pursuant to a timely Request for Exclusion and order of the Court.

(c) Any Class Member who does not timely file a Proof of Claim shall not be entitled to any share in the Class Settlement Funds, but shall nonetheless be bound by the Court's judgment in this matter and shall be forever barred and enjoined from asserting any of the Released Claims against any Released Party.

10. Memoranda in support of the Settlement, petitions for attorneys' fees and reimbursement of expenses by Plaintiffs' Counsel and individual awards to named plaintiffs shall be

filed with the Clerk of the Court on or before 35 days before the hearing described in paragraph 11.

11. A hearing (the "Settlement Hearing") shall be held before the undersigned at 8:30 a.m. on November 15th, 1993 in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128, to consider the fairness, reasonableness and adequacy of the proposed Settlement, the dismissal of the Litigation on the merits and with prejudice in accordance with the terms of the Stipulation, petitions for attorneys' fees and reimbursement of expenses by plaintiffs' counsel and to hear and determine such matters as the Court may deem appropriate. This hearing may be postponed, adjourned or continued by Order of the Court without further notice to the Class. Any such postponement, adjournment or continuance may be announced at the Settlement Hearing and there will be no other or further notice required with respect thereto.

12. Any Class Member who does not elect to be excluded may appear at the Settlement Hearing in person or by counsel, if an appearance is filed and served as hereinafter provided, and may be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement, the requested awards of attorneys' fees and reimbursement of expenses and/or the individual awards to the named Plaintiffs; provided, however, that no person shall be heard in opposition to the proposed Settlement and the judgment to be entered thereon, or to the requested awards of attorneys' fees and reimbursement of expenses, unless, on or before 15 days before the hearing described in paragraph 11 such person: (*a*) has filed with the Clerk of the Court a notice of such person's intention to appear together with a statement that indicates the basis for such opposition along with any supporting documentation and which includes the information identified in clauses (i), (ii) and (iii) of paragraph 7 herein, and (*b*) has served copies of such notice, statement, and documentation together with

copies of any other papers or briefs that such person files with the Court, either in person or by mail, upon Plaintiffs' Lead Counsel, Michael J. Pucillo, Esquire, Chimicles, Burt, Jacobsen & McNew, 222 Lakeview Avenue, Suite 960, West Palm Beach, Florida 33401; and upon Defendants' Representative Counsel, Lewis F. Murphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131-2398.

13. For settlement purposes only, the allegations in Plaintiffs' Fourth Consolidated Amended and Supplemental Complaint relating to the Class and Class Period are hereby amended by interlineation to be consistent with the definitions in the Stipulation.

14. The Court hereby grants, for settlement purposes only, Plaintiffs' motion to substitute the Estate of Harry Hood Bassett as a party defendant for Harry Hood Bassett.

15. All proceedings in the Litigation other than such as may be necessary to carry out the terms and conditions of the Stipulation or the responsibilities related or incidental thereto are stayed and suspended until further order of this Court.

16. Upon consummation and approval of the Settlement provided for in the Stipulation, the Stipulation, and each and every term and provision thereof, shall be deemed incorporated herein as if explicitly set forth and shall have the full force and effect of an order of this Court.

17. If the Settlement is terminated for any reason whatsoever, the Settlement and all proceedings had in connection therewith shall be without prejudice to the *status quo ante* rights of the parties to the action, and all Orders issued pursuant to the Settlement shall be vacated. In such an event, the Settlement and all negotiations concerning it, shall not be used or referred to in any manner for any purpose whatsoever in this or any other litigation.

DONE AND ORDERED at Miami, Florida, this 27th day of August, 1993.

/s/ KEVIN MICHAEL MOORE
Honorable Kevin Michael Moore
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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MASTER FILE
Filed November 1, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

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IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

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THIS DOCUMENT RELATES TO ALL ACTIONS

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## NOTICE OF INTENTION OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, TO APPEAR AT THE SETTLEMENT HEARING TO OPPOSE THE PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

PLEASE TAKE NOTICE, that William A. Brandt, Jr., as administrator of the Investment Plus Plan of Southeast Banking Corporation (the "Administrator"), by and through his undersigned counsel, hereby intends to appear at the Settlement Hearing in this action and oppose the Plaintiffs' Counsels' Joint Petition For An Award Of Attorneys' Fees And Reimbursement Of Expenses.

PLEASE TAKE FURTHER NOTICE, that the Administrator has filed with this Court The Memorandum Of Law Of

William A. Brandt, Jr., As Administrator Of The Investment Plus Plan Of Southeast Banking Corporation, In Opposition To Plaintiffs' Counsels' Joint Petition For An Award Of Attorneys' Fees And Reimbursement Of Expenses.

PLEASE TAKE FURTHER NOTICE, that the Administrator does not have the information described in the second paragraph under the heading REQUEST FOR EXCLUSION in the Notice Of Pendency Of Class Action, Proposed Settlement, Settlement Hearing, And Right To Appear And Notice To Nominees, nor any of the supporting documentation. The Administrator, however, is currently compiling this information and documentation, and will provide it to the necessary parties when it is available.

Respectfully submitted,

ROSS & HARDIES
Attorneys for William A. Brandt, Jr., as Administrator of the Investment Plus Plan of Southeast Banking Corporation

By: J. JOSEPH BAINTON
J. Joseph Bainton
65 East 55th Street
New York, New York 10022-3219
(212) 421-5555

Of Counsel:

Sean M. Sullivan
Andrew H. Beatty

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the NOTICE OF INTENTION OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, TO APPEAR AT THE SETTLEMENT HEARING TO OPPOSE THE PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES were served by regular mail, postage prepaid, on

Michael J. Pucillo, Esq.
Chimicles, Burt, Jacobsen & McNew
222 Lakeview Avenue
West Palm Beach, FL 33401

and

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2398

this 31st day of October, 1993.

/s/ ANDREW H. BEATTY
Andrew H. Beatty

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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MASTER FILE
Filed November 1, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

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IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

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THIS DOCUMENT RELATES TO ALL ACTIONS

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# MEMORANDUM OF LAW OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, IN OPPOSITION TO PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

ROSS & HARDIES
Attorneys for William A. Brandt, Jr., as Administrator of the Investment Plus Plan of Southeast Banking Corporation
65 East 55th Street
New York, New York 10022-3219
(212) 421-5555

## Preliminary Statement

William A. Brandt, Jr., as administrator of the Investment Plus Plan (the "Plan") of Southeast Banking Corp. ("Southeast") (the "Administrator"), by his attorneys, Ross & Hardies, submits this Memorandum of Law in Opposition to the Plaintiffs' Counsels' Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses.

The Administrator of the Plan, of which approximately 5,000 former employees of Southeast or it affiliates are beneficiaries, has reviewed the Plaintiffs' Counsels' Joint Petition For An Award of Attorneys' Fees and Reimbursement of Expenses (the "Fee Petition") and concluded that, based on the Fee Petition, an award of a $1,250,000 to plaintiffs' counsels—an amount totalling over 33.3% of the amount to be received by all of the plaintiffs—is unreasonable. Accordingly, the Administrator submits this Memorandum of Law, and respectfully requests that this Court deny the Fee Petition.

## Statement Of Facts

Although not one of the complaints brought on behalf of their clients survived the test of a motion to dismiss, plaintiffs' counsels believe they are entitled to a $1.25 million fee. In support of their request for this enormous fee, plaintiffs' counsels have filed a Fee Petition, which purports to explain and support their request. A review of the Fee Petition, however, fails to provide any evidence of how the fee amount of $1,250,000 was determined. Moreover, the Fee Petition offers no explanation of why it is reasonable to pay $1,250,000 to attorneys in a case in which no discovery took place and resulted in a *de minimis* recovery for their clients.

## Argument

### I. PLAINTIFFS' COUNSELS MUST PROVE THAT THE AMOUNT OF THE FEE REQUESTED IS REASONABLE

Plaintiffs' counsels' Fee Petition fails to set forth any basis to support the reasonableness of the amount sought. Plaintiffs' counsels attempt to excuse their failure to submit any evidence supporting the reasonableness of their Fee Petition by arguing that the Eleventh Circuit has adopted the "reasonable percentage" theory of determining an appropriate attorneys' fee in "common fund" cases, and that such support is not required under the reasonable percentage theory. In essence, plaintiffs' counsels argue that they should be given the $1,250,000 because a fee of 25% of the settlement amount is *prima facie* reasonable. This is a gross misstatement of the law.

Typically, attorneys' fees, where recoverable, have been awarded either based on a reasonable percentage of the amount recovered or by reference to a so-called "lodestar" analysis. Under the lodestar approach the court determines the number of hours reasonably spent by the plaintiff's attorney on the case and a reasonable hourly rate, and multiplies the resulting amount by a figure chosen to reflect the circumstances of the particular case. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974).[1]

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[1] The factors set out in *Johnson* are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. The court did not, as plaintiffs' counsels suggest, "reject" the lodestar factors set forth in *Lindy Bros.* and *Johnson* as elements to be considered in determining a *reasonable* percentage of the fund to be awarded as attorneys' fees, nor did the court establish any specific percentage which would be reasonable in all cases. In fact, the court specifically found that "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Id.* The court noted the importance of avoiding the problems and criticisms of a common fund fee award being summarily granted as a percentage of the fund recovered without any findings supporting its reasonableness, and wrote:

> The factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary. We agree with the Tenth Circuit that the *Johnson* factors continue to be appropriately used in *evaluating, setting and reviewing percentage fee awards in common fund cases*.

946 F.2d at 775 (Emphasis added).

The Eleventh Circuit relied, in part, upon *Brown v. Philips Petroleum Company*, 838 F.2d 451 (10th Cir.), *cert. denied*, 488 U.S. 822, 109 S.Ct. 66 (1988), where the Tenth Circuit observed that the percentage reflected in a common fund award must be reasonable, and wrote:

> To determine reasonableness, federal courts have relied heavily on the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in calculating and reviewing attorneys' fees awards, . . . Because these factors measure the

> attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases.

838 F.2d at 454.

Moreover, the fee applicant bears the burden of establishing the reasonableness of the requested fees. *Cf. Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988) ("fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates . . . [and] bears the burden in the first instance of supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate"). *See, also, Miller v. Mackey International, Inc.*, 70 F.R.D. 533, 537 (S.D. Fla. 1976) ("[I]n cases where the right to attorney's fees arises under the equitable fund doctrine, . . . the court must necessarily be presented with the information necessary to justify an award and to determine the fee.").

## II. PLAINTIFFS' COUNSELS HAVE FAILED TO ESTABLISH THAT THE AMOUNT OF THE FEE REQUESTED IS REASONABLE

Plaintiffs' counsels argue that the requested fee of $1,250,000 is reasonable in view of the "recovery obtained, the degree of risk involved, the complexity of this action, the number of hours invested, the vigorous contesting of law and fact between counsel for the settling parties through the course of this litigation, and the skill required to produce the result obtained in the proposed settlement." Plaintiffs' Counsels' Memorandum, at 29. Yet, plaintiffs' counsels have provided *no* support for these conclusory statements, or for the argument that a $1,250,000 fee is reasonable and fair given the services performed and the result obtained.

A. Plaintiffs' Counsels Have Presented No Proof That The Benefits Of The Settlement To The Plaintiffs Is Sufficient To Warrant A $1,250,000 Fee

Plaintiffs' counsels assert that the requested fee is justified because of the "skill required to produce the result obtained in the proposed settlement," but other than general conclusory statements about intense negotiations, they present no facts concerning the way in which the proposed settlement was reached. Without such information, the Court cannot evaluate what weight, if any, to give to the terms of the settlement in determining a reasonable fee. As the court explained in *City of Detroit v. Grinnell Corporation*, 560 F.2d 1093, 1099 (2d Cir. 1977):

> Especially in class actions, judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment; a large settlement can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel.

Such a cautious approach is particularly appropriate in this case. Pursuant to the proposed settlement, the $5 million settlement fund is to be paid from proceeds of insurance policies totalling $45 million. Plaintiffs' counsels have presented no facts establishing that a settlement for approximately 11% of available insurance proceeds is such a good result as to justify giving 25% of the recovery to the attorneys. Moreover, plaintiffs' counsels have presented no evidence concerning the damages which plaintiffs could have recovered if successful at trial. The Court cannot evaluate whether the $5 million settlement, when compared to the potential damages discounted by the likelihood of prevailing, represents a settlement of such benefit to the plaintiffs as to justify a $1,250,000 fee. Likewise, plaintiffs' counsels have presented

no facts concerning the manner in which settlement negotiations proceeded or in which the $5 million settlement was reached. Clearly, if the defendants' insurer offered to settle the plaintiffs' claims for $5 million at the time the initial complaint was filed, it could hardly be said that such a settlement resulted from the skill of plaintiffs' counsels. Yet, plaintiffs' counsels have failed to provide the Court with *any* information with which to make that determination. Where, as here, plaintiffs' counsels have declined to produce the evidence necessary to evaluate the "value" of the settlement to the plaintiffs, the Court should not consider the amount of the settlement as evidence that the requested $1,250,000 fee is reasonable.

B. Plaintiffs' Counsels Have Presented No Proof That The Number Of Hours Spent On This Matter Was Reasonable Or Warrants The Requested $1,250,000 Fee

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See, also*, *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) ( The first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking the fees. . . . The district court must determine not just the actual hours expended by counsel, but which of those hours were reasonably expended in the litigation."); *Brown v. Philips Petroleum Company*, 838 F.2d 451, 454 (10th Cir. 1988) (attorneys' hours reasonably billed and hourly rate "measure the attorneys' contributions, [and] are . . . appropriate in setting and reviewing percentage fee awards in common fund cases").

In this case, plaintiffs' counsels assert that their $1,250,000 fee request is reasonable because of the "number of hours

invested." According to plaintiffs' counsels' affidavits, they "invested" 3183.2 hours in this case. They further assert that, at the customary hourly rates charged by the attorneys involved, those services have a market value of $975,584—an *average* of $306.48 per hour. If the hours invested are applied to a $1,250,000 fee, the hourly rate increases to $392.69. Notwithstanding the enormous average hourly rate which plaintiffs' counsels are proposing they be paid, they have submitted *no* evidence to establish that the time they devoted to this case was reasonable. Moreover, because they have not submitted contemporaneous time records, neither the plaintiffs nor the Court can determine whether the time upon which they are relying as a ground for the $1,250,000 fee was *reasonably* spent.

It is well-settled that time which is not reasonably spent for the benefit of the plaintiff may not be the basis of an award of fees. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1982) ("The district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended.' "). For example, time expended on a discreet and unsuccessful claim should be excluded when determining an appropriate award of attorneys' fees. *Id. See, also, Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n determining reasonable hours the district court must deduct time spent on discrete and unsuccessful claims."). Similarly, hours spent duplicating work cannot form the basis of an award of attorneys' fees. *Norman*, 836 F.2d at 1301. As the Eleventh Circuit wrote in *Norman*:

> [A] lawyer may not be compensated for hours spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis. In the final analysis, exclusions for excessive or unnecessary work on given tasks must be left to the discretion of the district court. . . . Generalized statements that the

> time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much weight.

836 F.2d at 1301.

Because parties must be *specific* as to the reasonableness or unreasonableness of the time worked, it is imperative that the attorney seeking an award of fees submit evidence, preferably in the form of contemporaneous time records, which set forth in detail the tasks allegedly performed and the time devoted to those tasks. As the Supreme Court noted in *Hensley, supra*:

> [T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

461 U.S. at 437.

> Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

461 U.S. at 433. *See, also, Norman*, 836 F.2d at 1303 ("[F]ee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity."); *United Slate, Tile & Composition v. G&M Roofing*, 732 F.2d 495, 502 n.2 (6th Cir. 1984) (supporting documentation "must be of sufficient detail and probative value to enable the court to determine with a *high degree of certainty* that such hours were actually and reasonably expended"); *Brown*, 838 F.2d at 456 n.3 (availability of contemporaneous time records enhances the trial court's ability to properly evaluate the "time and labor involved" factor in a common fund case); *Cantor v. Detroit Edison Company*, 86 F.R.D. 752, 764 (E.D. Mich. 1980) (in complex fee award case "it is at least incumbent upon counsel to keep careful time records," and no allowance of fees may be made on the basis of "reconstructed" time). *Cf. Gutierrez v. City of*

*Hialeah*, 729 F. Supp. 1329, 1335 (S.D. Fla. 1990) (detailed accounting of the hours, costs and purposes of work expended is necessary in order to enable opposing counsel and the court to consider the reasonableness of attorneys fees and costs requested as sanction for violation of Rule 11); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 374 (E.D. Pa. 1976) ("We think that class action counsel in seeking an award of counsel fees from the court have an affirmative obligation to themselves and to the court to present a detailed, accurate and comprehensive fee petition.").

Here, plaintiffs' counsels have failed to submit contemporaneous time records, or any other evidence to establish that the specific work on which they base their fee request was reasonable. Without such evidence the Court cannot determine whether the requested fee is reasonable, and plaintiffs' counsels' Fee Petition should therefore be denied.

## CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Counsels' Fee Petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the MEMORANDUM OF LAW OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, IN OPPOSITION TO PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES were served by regular mail, postage prepaid, on

Michael J. Pucillo, Esq.
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and

Lewis F. Murphy, P.A.
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this 31st day of October, 1993.

/s/ ANDREW H. BEATTY
Andrew H. Beatty